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No. 1020

In the Supreme Court of the United States

OCTOBER TERM, 1969

GERSHON L. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
JOHNNIE M. WALTERS,
Assistant Attorney General,
JOSEPH M. HOWARD,
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OPINION BELOW

The opinion of the court of appeals, as modified following a petition for rehearing (Pet. App. A, pp. 1–4; Pet. App. B, p. 5) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1969 (Pet. App. A, pp. 1–4). A petition for rehearing was denied on December 2, 1969 (Pet. App. B, p. 5). The petition for a writ of certiorari was filed on December 31, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

375-631—70

QUESTION PRESENTED

Whether the court of appeals properly held that the district court's denial of a motion to quash a grand jury subpoena duces tecum was not appealable and that a petition for a writ of mandamus should be denied.

STATEMENT

On August 9, 1968, petitioner, as vice president and controller of Westdale Savings and Loan Association, was served with a subpoena duces tecum (R. 38) directing him to appear before a grand jury, Central District of California, on August 20, 1968, and to produce the following books and records of Westdale Savings and Loan Association for the years 1962 to 1966: (1) Cash disbursements records for payments of General Operating Expenses; (2) Charts of Accounts; (3) Minute Books; (4) Retained copies of financial statements filed with the Federal Home Loan Bank Board; (5) General Journal Adjusting Entries; and (6) Operating Expense Ledgers.

Petitioner's motion to quash the subpoena was filed on August 16, 1968, and was denied by the district court the same day (R. 59, 60). Petitioner then filed a notice of appeal (R. 2) and a petition for a writ of prohibition or mandamus.

In an order filed September 10, 1968 (Pet. App. C, pp. 6–11; R. 5–10), Circuit Judges Barnes and Ely stayed compliance with the subpoena and, in addition, authorized the district court to conduct any further hearings which, upon any motion of petitioner, it might choose to conduct and which might

tend to afford the court of appeals a more complete record upon which to rest its disposition of the matter.

On September 17, 1968, petitioner filed in the district court a motion to make a more complete record (R. 4). On November 4, 1968, the government filed its opposition to petitioner's motion, together with the affidavit of Donald A. Hansen and a memorandum of points and authorities in support of the opposition (R. 11–26).

Due to the imminent expiration of the life of the grand jury before which the subpoena duces tecum was returnable, a stipulation was entered into on December 6, 1968, providing that, if acceptable to the court of appeals, the expiration of the grand jury's life would not cause the litigation to become moot and that it would not be necessary for the government to have a new subpoena issued to petitioner Lewis (R. 34–38).

On December 9, 1968, the district court issued an order granting petitioner's motion to make a more complete record on appeal (R. 39–41). It provided for the filing of a motion to quash and supporting affidavits and for the filing thereafter of an opposition by the government.

On December 20, 1968, petitioner filed a renewal of motion to quash the subpoena, together with the affidavit of Walter S. Weiss (R. 45–50). On December 31, 1968, the government filed its opposition to the renewed motion to quash the subpoena (R. 42–44), stating that the renewed motion and supporting affi-

davit did not set forth any new grounds for quashing the subpoena. For its opposition, the government therefore adopted and relied upon its November 4, 1968, opposition to the motion to make a more complete record and the affidavit of Donald A. Hansen and memorandum of points and authorities in support thereof (R. 11–26).

On February 26, 1969, the district court denied the renewed motion to quash the subpoena duces tecum and ordered that the record of the district court proceedings be forwarded to the Clerk of the Court of Appeals (R. 56–58).

The opinion of the court of appeals (Pet. App. A, pp. 1–4) consolidated this case with the similar case of *Lampman and Thriftimart, Inc.* v. *United States, et al.*, which is pending before this Court on a petition for certiorari in No. 1014. The court held that the orders of the district court were interlocutory and not appealable, citing *Cobbledick* v. *United States*, 309 U.S. 323, and were not such that the court of appeals should seek to control the district court's action under the All Writs Act (28 U.S.C. 1651), citing *Will* v. *United States*, 389 U.S. 90.

ARGUMENT

Petitioner contends (Pet. 10–19), in substance, that the government is seeking to abuse the independence of the grand jury and the secrecy of its proceedings by having special agents of the Internal Revenue Service sworn as agents of the grand jury and by having them examine subpoenaed books and records for the assistance of the grand jury.

As set forth in the affidavit of Donald A. Hansen, Special Attorney, Department of Justice (R. 12–15), the subpoena duces tecum for books and records of Westdale Savings and Loan Association was issued in connection with a grand jury investigation, duly authorized by the Department of Justice, concerning political campaign contributions and their treatment for federal income tax purposes. Involved are possible violations of the internal revenue laws and of laws relating to political contributions (18 U.S.C. 608, 610) and possible conspiracies to defraud the United States. Following production of the subpoenaed books and records before the grand jury, they will remain in the custody of the grand jury and the United States Attorney and will be available for examination only by the grand jury, attorneys of the Department of Justice, and agents of the Internal Revenue Service who have been sworn as agents of the grand jury and authorized by it to examine the books and records, out of the presence of the jury, for the sole purpose of reporting to the grand jury and assisting the grand jury in its investigation. There will be no disclosure of the books and records or information obtained from them to unauthorized persons by the Department of Justice or its attorneys or by the agents of the grand jury. Agents of the Internal Revenue Service sworn as agents of the grand jury will not be present while the grand jury is in session except to the extent that one of them may be before the grand jury as a witness.

The proposed use of agents of the Internal Revenue Service as agents of a grand jury is consistent with long established practices of the Department of Justice in the conduct of inquisitorial grand jury investigations. When voluminous books and records are subpoenaed in such investigations, as here, it is necessary that the grand jury have the assistance of accounting experts who can examine and explain the books and records for the grand jury. This does not involve any abuse of the grand jury system.

In the case of *In re April 1956 Term Grand Jury*, 239 F. 2d 263 (C.A. 7), involving facts and allegations similar to those before this Court, an action was brought against the United States in which it was prayed that grand jury subpoenas duces tecum be quashed on grounds that they constituted aggravated harassment of petitioners, were an unreasonable search and seizure, a violation of constitutional rights of petitioners and (p. 268) "but a step in an illegal scheme of the treasury to subvert the grand jury subpoena of this court into a tool for a treasury fishing expedition." In that case, the Internal Revenue Service had attempted by administrative summonses to gain access to certain books and records. When compliance with the summonses was refused, no effort was made to enforce compliance. Instead, upon the recommendation of the Treasury Department to the Department of Justice, a grand jury commenced an investigation. By subpoenas duces tecum, the grand jury obtained records which the Internal Revenue Service had been unable to obtain through its administrative summonses. With the con-

sent of the grand jury, those records were turned over to agents of the Internal Revenue Service for examination.

The court said (p. 269) the issue before it was whether the grand jury was acting within its authority in swearing in Treasury agents and then entrusting them with subpoenaed records for examination, out of the presence of the jury, for the purpose of assisting the grand jury in its deliberations. The court held that the grand jury's actions under the circumstances were immune from interference by the court. However, the court said the rule of secrecy with respect to grand jury proceedings would forbid use for any civil purpose of information obtained through an examination of records made under the authority of the grand jury.

There are other decisions in which the courts have held that outside experts may examine records obtained by grand jury subpoena for the purpose of assisting the grand jury. In *United States* v. *Invader Oil Corp.,* 5 F. 2d 715 (S.D. Cal.), a motion was made to quash grand jury subpoenas duces tecum on the ground, among others, that the documents were wanted primarily for examination by postal inspectors and not by the grand jury. In overruling the motion, the court said that the records called for might be necessary to enable the grand jury or its experts to uncover suspected fraudulent acts and that it would be assumed the grand jury would act in accordance with law. In *United States* v. *Culver,* 224 F. Supp. 419, 432 (Md.), it was held that defendants could not complain because subpoenaed rec-

ords were turned over to a postal inspector for sifting and copying preparatory to their consideration by the grand jury.

In *Application of Kelly,* 19 F.R.D. 269 (S.D. N.Y.), a labor union whose records had been subpoenaed by a grand jury expressed concern, in connection with a motion to quash the subpoena, that the records would be made available, or the information derived therefrom would be disclosed, to unauthorized persons or hostile interests with whom the union was or might be engaged in civil litigation. The United States Attorney represented to the court that only members of his staff and accountants of the Internal Revenue Service and F.B.I. would examine the records and that information derived therefrom was intended for formal presentation to the grand jury and would not be disclosed to unauthorized persons. The court said that this representation was sufficient but that, if the union desired a protective order, such a provision could be incorporated in the order to be entered.

The cases cited by petitioner (Pet. 11–14) are inapposite, for they involve the presence of unauthorized persons in the grand jury room while the grand jury was in session. Such presence of an unauthorized person, contrary to provisions of Rule 6(d), Federal Rules of Criminal Procedure (Pet. 5), is not involved here.

As held by the court of appeals, it is clear that the district court's denial of the motion to quash the subpoena duces tecum is interlocutory and not re-

viewable on appeal, *Cobbledick* v. *United States,* 309 U.S. 323.

Concerning the petition for a writ of prohibition or a writ of mandamus, petitioner has not shown any extraordinary cause for issuance of those extraordinary writs. In *Will* v. *United States,* 380 U.S. 90, 95–96, this Court stated that the writ of mandamus has traditionally been used only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so; that only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy; and that a party seeking mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable. The Court further stated (p. 104) that the extraordinary writs do not reach the cases where the district court may have erred on matters within its jurisdiction and that the writs may not be used to thwart the congressional policy against piecemeal appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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